STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE McCLELLAND,
As Co-Personal Representatives of the Estate of
KEGAN McCLELLAND, Deceased and LACY HARTER,
Individually and MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

vs.

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

and
HOWELL AERIE #3607 FRATERNAL ORDER
OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER
OF EAGLES, HARRIS SEPTIC CLEANING AND
ALWAYS CLEAN PORTABLE TOILETS, INC.,
DALE HARRIS, Individually, and AMERICAN
CONCRETE PRODUCTS, INC., Individually,

Defendants, Not Participating.

Supreme Court Docket No: 126255

COA Docket No: 244689
L.C. Case No. 00-17892-NO
HON. DANIEL A. BURRESS

COURT OF APPEALS PANEL:
HON. JESSICA COOPER
HON. KAREN FORT HOOD
and
DISSENTING:
HON. PETER D. O'CONNELL

GEOFFREY N. FIEGER (P30441)
ROBERT M. GIROUX, Jr. (P47966)
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555

JOHN A. COTHORN (P32428)
Attorney at Trial for Grand
and Michigan Aeries
530 Buhl Bldg., 535 Griswold
Detroit, MI 48226
(313) 964-7600

JOHN P. JACOBS (P15400)
Attorney for Defendant-Appellant
Grand Aerie Fraternal Order of Eagles
Suite 600, The Dime Building
719 Griswold, P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

CHARLES C. CHEATHAM (P11815)
Attorney for Defendant-Appellee
Eagles Aerie #3607
261 East Maple Road
Birmingham, MI 48009
(248) 642-6511

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

REPLY BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

JOHN P. JACOBS, P.C.
BY: JOHN P. JACOBS (P15400)
Attorneys for Defendant Appellant
Grand Aerie Fraternal Order of Eagles
Suite 600, The Dime Building
719 Griswold
P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

TABLE OF CONTENTS

Page(s)

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

INDEX OF AUTHORITIES

FEDERAL CASES

STATE CASES

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

STATEMENT OF FACTS

Defendant-Appellant Grand Aerie Fraternal Order of Eagles (hereinafter "the Grand Aerie") relies upon the Statement of Facts found in its principal Brief in support of its Application for Leave to Appeal, filed June 1, 2004.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

ARGUMENTS

I.

CONTRARY TO PLAINTIFFS' ARGUMENT, THE DEFAULT JUDGMENT MUST BE VACATED BECAUSE IT WAS IMPROPERLY ENTERED AS A MATTER OF LAW.

Plaintiffs' Brief seeks to impose over Eight Million Dollars ($8,000,000.00) on a Default Judgment which, simply put, flies in the face of Michigan law, notwithstanding the invocation of the "abuse of discretion" rule which is at the core of Plaintiff's analysis. That defensive analysis overlooks that the question here is one of law - - and the distinction warrants Supreme Court review.

As we will now demonstrate, Plaintiff has urged the Supreme Court to make a host of serious legal errors to affirm this injustice. We prove our point by demonstrating the more outrageous errors as examples which will serve to convince the Supreme Court which of the parties' arguments are correct, which are not and which are worthy of review.

The procedures governing the setting aside of default judgments are set forth in Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 600 NW2d 638 (1999) and they scarcely serve to justify the wildly unfair judgment in this case. As the Supreme Court noted there, a ruling on a motion to set aside a default judgment is entrusted to the sound discretion of the trial court and will not be reversed unless there is a clear abuse of discretion. Id. at 227; see also Amco Builders & Developers, Inc, 469 Mich 90, 94, 666 NW2d 623 (2003). An abuse of discretion occurs when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. Dep't of Transp v Randolph, 461 Mich 757, 768, 610 NW2d 893 (2000); Spalding v Spalding, 355 Mich 382, 384-385, 94 NW2d 810 (1959). As was further explained in Alken-Ziegler, supra at 229,

> . . . although the law favors the determination of claims on the merits, . . . it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered. [Citations omitted and emphasis added.]

Accordingly, the first step in determining whether, as here, a lower court has abused its discretion requires answering the question whether the default judgment itself was properly or

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

improperly entered. To respond to this question, it is necessary to ascertain **the scope** of the court's discretion with regard to the decision claimed to be error. The question regarding the scope of a court's discretion is **a question of law** that is reviewed de novo. See Traxler v Ford Motor Co, 227 Mich App 276, 280, 576 NW2d 398 (1998) (the scope of a trial court's powers to enter a default judgment under the court rules is a question of law that this Court reviews de novo). Once it is determined that a default judgment was improperly entered, as here, **as a matter of law**, it automatically follows that the default judgment must be set aside. On the other hand, if the default judgment was properly entered, the next step is to consider whether the party seeking to set aside the default judgment has demonstrated good cause and a meritorious defense under MCR 2.603(D)(1). Alken-Ziegler, supra at 232-233.[1]

It is abundantly clear here that the default judgment in this case was egregiously and improperly entered as a matter of law because the Grand Aerie cannot be defaulted for the independent actions of the insurance companies and agents which otherwise provided it insurance coverage at the MCR 2.401(F) settlement conference. "A trial court's authority to enter a default judgment must fall within the parameters of the authority conferred under the court rules."; this determination is one of law, not discretion. Henry v Prusak, 229 Mich App 162, 168, 582 NW2d 193 (1998) (citing Kornak v Auto Club Ins Ass'n, 211 Mich App 416, 420, 536 NW2d 553 (1995)). In Henry, the Court of Appeals held that the court rules substantively do not authorize default against a party based on the failure of a representative of a party's insurance carrier to attend a settlement conference or make a settlement offer. See also, Luplow v Aubry Cleaners & Dyers, Inc, 366 Mich 353, 357-358, 115 NW2d 110 (1966) a trial court was not authorized at law to enter the default of a party simply because the party's attorney unintentionally failed to appear at a pretrial hearing); McGee v Macambo Lounge, Inc, 158 Mich App 282, 286-288, 404 NW2d 242 (1987) ("[a] default judgment, to be valid, must be sanctioned by applicable state court rules," and the court

[1] Under Alken-Ziegler, the good cause and meritorious defense factors under MCR 2.603(D)(1) are considered only in connection with properly entered default judgments, not improperly entered default judgments.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

rules do not "authorize[ ] default of a party for the failure of a representative of the party's insurance carrier to attend a settlement conference").

Further, the default judgment entered below was wholly improperly entered against the Grand Aerie because the requisite differential analysis set forth in Dean v Tucker, 182 Mich App 27, 32, 451 NW2d 571 (1990) was not remotely undertaken before the drastic sanction of a default judgment was imposed. The obligation of Judge Burress to engage in lesser penalties was not even considered. In any case, as detailed on pages 23-24 in the principal Brief in support of this Application for Leave to Appeal, "there were a host of lesser sanctions which would have better served the interest of justice than a drastic default" had the essential, differential Dean factors been applied.

Accordingly, the default judgment must be vacated because it was improperly entered against the Grand Aerie as a matter of well-established law. Hiding behind the rule of discretion when the trial court has acted **unlawfully** is not permitted. This case begs for Supreme Court review.

II.

EVEN IF THE DEFAULT JUDGMENT WERE SOMEHOW SAID TO BE PROPERLY ENTERED, IT SHOULD NONETHELESS BE SET ASIDE BECAUSE THE GRAND AERIE HAS ESTABLISHED GOOD CAUSE AND A MERITORIOUS DEFENSE UNDER MCR 2.603(D)(1).

However, even assuming for the sake of argument that the default judgment entered against the Grand Aerie were properly entered, then it still should be set aside because the Grand Aerie established the separate and distinct requirements of "good cause" and a "meritorious defense." Alken-Ziegler, supra at 232-233. Good cause sufficient to warrant setting aside a default judgment may be shown by reasonable excuse for the failure to comply with requirements that created the default. Id. Under Alken-Ziegler, an absolute defense substantially lowers the "good cause" requirement under MCR 2.603(D)(1).

As conclusively demonstrated in the principal Brief in support of our Application at pages 19-21, the Grand Aerie easily had "good cause" to set aside the default judgment. Throughout this

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

case, the Grand Aerie persistently and repeatedly took the initiative in seasonably supplementing its responses to discovery requests in conformity with MCR 2.302(E), ensuring that correct information was given to Plaintiffs. See Richardson v Ryder Truck Rental, Inc, 213 Mich App 447, 451, 540 NW2d 696 (1995) (noting that "an innocent, unintentional failure to seasonably supplement an interrogatory should not be considered a knowing concealment [and] so drastic a sanction as dismissal is [not] warranted where there has been no finding of a knowing concealment"). Further, as already explained, the Grand Aerie cannot be defaulted for failing to have an authorized agent at the MCR 2.401(F) settlement conference as a matter of law. Henry; McGee, supra. The Grand Aerie is not legally responsible for the actions of an insurance company and its agents who refused to protect the insured. This is tantamount to a deprivation of federal Due Process. This is a double injustice: legally imposing vicarious liability for a local chapter which even the Court of Appeals Majority agreed was not lawful **and**, secondarily, imposing liability for on insurer and for insurance agents the Grand Aerie had no control over, to the tune of over $8 Million, no less.

The Grand Aerie also had a complete defense to Plaintiffs' claims, having no direct or vicarious liability in this case. Simply put, the evidence presented to Judge Burress indisputably established that the Grand Aerie could not be directly liable because it exercised no dominion and control over the Howell #3607 premises. Further, Colangelo v Tau Kappa Epsilon, 205 Mich App 129, 517 NW2d 289 (1994)[2] and Kratze v Order of Oddfellows, 190 Mich App 38, 475 NW2d 405

[2] It is, frankly, utterly amazing to counsel for Defendant that Judge Burress **himself** was on the panel that decided Colangelo which held that there is no vicarious liability for a national fraternal organization for the torts of a local chapter. Is there any wonder that Grand Aerie believes that it was unjustly treated by both the denial of the Summary Disposition, which was patently clear on its face and by entry of a Default Judgment for the actions of its insurers?

(1991), rev'd in part on other grounds 442 Mich 136 (1993) preclude the imposition of vicarious liability of a local chapter as a controlling legal matter, as even the Court of Appeals' Majority conceded in principle.

Finally, "manifest injustice" would occur if this default judgment is not set aside. As the Court of Appeals explained in Barclay v Crown Building & Development, Inc, 241 Mich App 639, 653, 617 NW2d 373 (2000),

> Manifest injustice is *not* a third form of good cause that excuses a failure to comply with the court rules where there is a meritorious defense. Rather, it is the result that would occur if a default were not set aside where a party has satisfied the "good cause" and "meritorious defense" requirements of the court rule. (Emphasis in original; citations omitted).

It is beyond cavil that it would be the height of manifest injustice to hold the Grand Aerie liable on the $8.3 million Judgment for errors that were demonstrably attributable only to insurers who failed to act for the insured, actions not attributable to the Grand Aerie itself, which has an absolute, substantive defense to boot in this case which is wholly controlling.

Thus, even if the default judgment were otherwise properly entered against the Grand Aerie, which it was not, it must be set aside by the Supreme Court in any event under MCR 2.603(D)(1) because the Grand Aerie established the separate and distinct requirements of "good cause" and a "meritorious defense" and that manifest injustice would result if the judgment were not set aside. The Supreme Court must act in justice here to set aside the Default Judgment.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

III.

THE GRAND AERIE IS NOT ESTOPPED FROM CHALLENGING THE DENIAL OF ITS SUMMARY DISPOSITION MOTION, AND PLAINTIFFS' ARGUMENT THAT JUDGE BURRESS PROPERLY DENIED SUMMARY DISPOSITION IS CONTRARY TO LEGAL AUTHORITY.

Plaintiffs' assertion, with which the Court of Appeals' Majority agreed (Opinion, p 5), was that the default as to liability precludes review of the Grand Aerie's motion for summary disposition. This proposition is flat-out wrong.[3] As stated in Ritchie v Michigan Consolidated Gas Co, 163 Mich App 358, 367, 413 NW2d 796 (1987), "Michigan Court Rules provide that a party who has been denied summary disposition may proceed to final judgment and then bring an appeal of that denial. MCR 2.116(J)(2)(c)." An order granting a default judgment is a final judgment. Allied Electric Supply Co, Inc v Tenaglia, 461 Mich 285, 288, 602 NW2d 572 (1999). Thus, on its appeal to the Court of Appeals, the Grand Aerie was perfectly entitled to raise the order denying its motion for summary disposition on the issue of its legal duty and have it decided on the merits as a matter of appellate legal jurisdiction. MCR 7.202(7)(a) (i).

Summary disposition is reviewed de novo to determine whether the moving party was entitled to a judgment as a matter of law. Dressel v Ameribank, 468 Mich 557, 561, 664 NW2d 151 (2003); Morales v Auto-Owners Ins Co, 458 Mich 288, 294, 582 NW2d 776 (1998). Generally, no duty exists unless there is a special relationship or some special circumstance. Beaudrie v Henderson, 465 Mich 124, 141, 631 NW2d 308 (2001). Premises liability is conditioned

---

[3]The citation of the Court of Appeals Majority to Wood v DAIIE, 413 Mich 573, 578, 321 NW2d 653(1982) and Kalamazoo Oil Co v Boerman, 242 Mich App 75, 79, 618 NW2d 66 (2000) in support of the proposition that "[a] default judgment settles the issue of liability and the defaulted party is precluded from relitigating that issue" is defiantly, grossly, wildly off the mark. While these cases reference the well-established principle that "a default settles the question of liability and precludes the defaulting party from litigating that issue [at trial]," they absolutely do not stand for the proposition that a defaulted party loses its standing to have a **previously** decided dispositive motion regarding its liability considered by an appellate court in a subsequent appeal.

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

upon the presence of both possession of and control over the premises. Kubczak v Chem Bank and Trust, 456 Mich 653, 660, 575 NW2d 745 (1998). Liability depends upon actual possession and control. Id. at 662. Questions regarding duty are for the court to decide as a matter of law, Harts v Farmers Ins Exchange, 461 Mich 1, 6, 597 NW2d 47 (1999), and are subject to de novo review. Benejam v Detroit Tigers, 246 Mich App 645, 648, 635 NW2d 219 (2001).

Plaintiffs' point is without merit on its face: Defendant is not estopped from challenging an earlier Summary Disposition which was denied after a later Default Judgment becomes entered.

Furthermore, the Summary Disposition motion should cause the Appellate Court to review whether there are **meritorious defenses** asserted on Summary Judgment which justify setting aside of the **later** default judgment. INVST Financial Group, Inc. v Chem Nuclear Systems, Inc., 815 F2d 391, 403 (CA 6 Mich 1987).

Put another way, the Meritorious Defenses stated in a Summary Disposition Motion have been recognized in Michigan to suffice for the setting aside of a default or default judgment. Haeffle v Meijer, Inc., 165 Mich App 485, 418 NW2d 900 (1980). Bennett v Attorney General, 65 Mich App 203, 237 NW2d 750 (1976) (Summary Disposition asserted **after** default grounds). And when an insurance company or agent puts the insured into default, the defaulted defendant can utilize the meritorious defense articulated by an even **later** Summary Disposition Motion which, after the default is set aside, should then be implemented to dismiss the action completely on the merits. See Allmeningder v Southeastern Michigan Ice Services, 2002 WL 745226, cited below to Judge Burress which he declined to follow.

Before Judge Burress, the Grand Aerie indisputably established that it had no direct liability in this case because the premises in question were owned exclusively by the Howell #3607 and that the Grand Aerie did not have any legal or actual authority or control over the Howell #3607 property. The Grand Aerie also demonstrated that it did not have vicarious liability because the

Howell #3607 was not its agent.[4] While plaintiffs sought to manufacture a genuine issue of material fact by referencing the conclusory affidavit of Lacy Harter to suggest the existence of a question of fact regarding the Grand Aerie's dominion and control over the Howell #3607 premises, an affidavit submitted in opposition to a motion must affirmatively show that the affiant, if sworn as a witness, could actually testify competently to the facts stated in the affidavit, which Ms. Harter could not. MCR 2.119(B)(1)(c); Regents of University of Michigan v State Farm Mut Ins Co, 250 Mich App 719, 728, 650 NW2d 129 (2002). Speculation and conjecture are insufficient to establish a genuine issue of material fact. Detroit v GMC, 233 Mich App 132, 139, 592 NW2d 732 (1998). Here, Lacy Harter was simply not a competent witness to testify about the legal relationship between the Grand Aerie and the Howell #3607, and her statements contained in the affidavit were nothing but speculation and conjecture.

Under proper appellate review, Plaintiffs' judgment must be set aside, a Judgment Notwithstanding the Verdict entered and the Grand Aerie dismissed from the case.

CONCLUSION

When Plaintiffs' Brief is compared with the foregoing legal citations, the impetus of granting the within Application becomes inexorable.

The question before the Supreme Court is a de novo question of law. As the insurers and their agents here primarily, if not exclusively, caused the problems with which Judge Burress

---

[4]That Howell #3607 admitted that it was acting as the agent of the Grand Aerie as part of its improper "Mary Carter" agreement with Plaintiffs should not be considered in determining whether Judge Burress erred in denying the Grand Aerie's motion for summary disposition because only documentary evidence filed at the time of the motion may be considered in reviewing this issue. Pena v Ingham, 255 Mich App 299, 313 n 4, 660 NW2d 351 (2003).

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900

mercilessly used to impale Grand Aerie, all MCR 2.603(D)(1) "good cause" considerations demonstrated in this case became very, very compelling, indeed. Plaintiffs do not even present any serious argument about the meritorious legal defenses of Defendant Grand Aerie being wholly dispositive to defeat this staggering liability, nor is there much doubt but that there should be appellate review of the vicarious liability question.

In short, what is presented here are extremely important exciting questions which are fully "grantworthy".

There are no close questions in a Eight Million Dollar ($8,000,000.00) default case. Leave to Appeal should be granted by the Michigan Supreme Court.

RELIEF

WHEREFORE, Defendant-Appellant the Grand Aerie prays that this Application for Leave to Appeal be granted, the Judgment in Plaintiffs' favor be vacated and Judgment Notwithstanding the Verdict be entered, together with all costs of appeal in the Court of Appeals and in the Michigan Supreme Court.

Respectfully submitted,

JOHN P. JACOBS, P.C.

BY: _____

JOHN P. JACOBS (P15400)
Attorneys On Appeal for Defendant-Appellant
Grand Aerie
Suite 600, The Dime Building, 719 Griswold
Post Office Box 33600
Detroit, MI 48232-5600
(313) 965-1900

Dated: November 19, 2004

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900